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No. 89-1347

In The

Supreme Court of the United States

October Term, 1989

GRACE E. BESSAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION AND NATIONAL INHOLDERS ASSOCIATION & MULTIPLE-USE LAND ALLIANCE IN SUPPORT OF PETITIONER

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Mountain States Legal Foundation (MSLF) and National Inholders Association & Multiple-Use Land Alliance (NIA) respectfully submit this brief *amici curiae* in support of Ms. Grace E. Bessay, the Petitioner for *certiorari*.[1]

[1] *Amici* have obtained the written consent of the parties to the action below, pursuant to Rule 37.2 of the Supreme Court Rules.

INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation is a non profit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. Mountain States Legal Foundation has an extensive background and expertise in public land law, particularly as it relates to the activities of the Department of the Interior, including the National Park Service. The nearly 3,000 members of Mountain States Legal Foundation – from every state in the Union – are vitally interested in ensuring the protection of private property from illegal appropriation by the United States Government.

National Inholders Association & Multiple-Use Land Alliance has over 15,000 members in all 50 states. NIA represents over 1.2 million people who own land or some type of equity interest within the boundaries of federally managed areas – managed variously by the National Park Service, the Fish and Wildlife Service, the Bureau of Land Management, the Corps of Engineers, and the U.S. Forest Service – or who are impacted by the management and regulation of, or access to, those areas. With offices in Concord, Massachusetts; Cascade Locks, Oregon; Battle Ground, Washington; and Sonoma, California; NIA has acted as a consultant to private citizens as well as cities, counties and states concerned about protecting the rights and property of their residents from excessive federal land acquisition and regulation.

Each of America's small communities fears for the basic economic fabric of its community. As more and more land is purchased by the U.S. Government, the tax base shrinks, funds for roads, schools and community support services become more scarce and the economic burden is shifted to other landowners, causing additional hardship, relocation and erosion of the quality of life.

STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case. However, *amici* make the following statement by way of simplification and clarification.

In 1961, the United States Congress adopted into law The Cape Cod National Seashore Act. In the extensive legislative history that accompanied adoption of that statute, Congress made it clear that it sought to preserve not just the windswept shore, but the weathered shacks that dot the dunes of Cape Code. Both are part of the harsh, austere, and Spartan scene that so characterizes the Cape Code seashore.[2]

In order to ensure that the owners of those cottages would be permitted to remain free of the eminent domain powers of the National Park Service – acting for the Secretary of the Interior – Congress wrote the "improved property" exemption into the Act. Except for a requirement that each of the six towns in which cottages were located adopt zoning by-laws consistent with regulations adopted by the Secretary of the Interior, there was no other requirement to be free from the threat of condemnation. All that was necessary was that a cottage meet the

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[2] The legislative history is clear on this subject:

> Lower Cape Cod cannot be considered solely as a geographical area with certain physical characteristics. The Lower Cape must also be viewed as a way of life – a culture – which though conditioned by its environment finds its essence in the people who have lived and are living there. This bill seeks to preserve the way of life which these people have established and maintained on the Cape.

S. Rep. No. 428, 87th Cong., 1st Sess. 19, *reprinted in* 1961 *U.S. Code Cong. & Ad. News* 2212, 2227.

Ms. Bessay's cottage is clearly one of the rustic dwellings meant to be preserved by Congress, since her cottage is one of 18 structures determined by the Keeper of the National Register of Historic Places, National Park Service, to be eligible for the National Register as an historic district.

definition of "improved property" included in the Act itself. That definition could not have been more simple: "a detached, one-family dwelling the construction of which was begun before September 1, 1959. . . ."[3]

Notwithstanding that extensive legislative history, and the use of a word – to wit: "dwelling" – which means simply "a building or other shelter in which people live,"[4] the National Park Service ignored the intent of Congress, as expressed in the Act and the legislative history, and subverted the definition of the word "dwelling" in order to condemn the property of petitioner. For the National Park Service – and for no one else in this country – "dwelling" means not simply "a building or other shelter in which people live," but "a building or other shelter – *with* indoor plumbing and electricity – in which people live." Having so defined "dwelling," and having demonstrated that petitioner's property did not have indoor plumbing or electricity, the National Park Service then invoked the power of eminent domain against petitioner's cottage.[5]

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[3] 16 U.S.C. § 459b-3(d).

[4] *Webster's New Collegiate Dictionary*, G. & C. Merriam Co. (1980).

[5] Petitioner, Grace E. Bessay, owns a cottage and 8.17 acres of land within Tract No. 8-P-1036 of the Cape Code National Seashore in an area of the dunes in Provincetown, Massachusetts, known as "Peaked Hill." Ms. Bessay's cottage is typical of the other dune cottages at Peaked Hill. It has two rooms, measures eighteen-and-one-half by sixteen-and-one-half feet, and has a five-foot wide porch along the length of the building. The cottage is equipped with a kitchen sink, a gas cooking stove and a gas refrigerator. The cottage does not have electricity or indoor plumbing. Instead, like most Peaked Hill dune cottages it is lighted primarily with kerosene lamps and is supplied with potable water from its own well. The cottage has a chemical toilet for sanitary disposal of human wastes.

That is the crux of this case: an extensive legislative history in which Congress made it clear that it wanted to preserve in private ownership preexisting, detached, one-family residences on the beach, and the use of the word "dwelling" to define what property would be protected from the eminent domain power of the Secretary of the Interior.

Notwithstanding the clarity of the intent of Congress, and notwithstanding the simple, straightforward meaning of the word as used by Congress, *i.e.*, "dwelling," the National Park Service condemned the cottage of an elderly home owner on Cape Cod, Grace E. Bessay. Incredibly, the District Court and then the First Circuit Court of Appeals condoned the actions of the National Park Service. In so doing, the District Court and then the First Circuit Court of Appeals ignored the extensive legislative history and evidence of Congressional intent in The Cape Cod National Seashore Act; went beyond the words of the statute in defining "dwelling;" went beyond the ordinary, contemporary, and common definition of "dwelling;" and failed to strictly construe the grant of the power of eminent domain.

It is this decision from which Ms. Bessay seeks relief in the power of this Honorable Court to review decisions from below which are in direct and intolerable conflict with the decisions of this Honorable Court. It is from this decision that *amici* seek review for the far-reaching and devastating impact it will have upon thousands of men and women who are similarly situated.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS CREATES A DIRECT AND INTOLERABLE CONFLICT WITH THE DECISIONS OF THE U.S. SUPREME COURT.

The decision of the First Circuit Court of Appeals upholding the decision of the District Court is in direct

and apparent conflict with numerous decisions of this Honorable Court.

A. The Decision Of The First Circuit Court Of Appeals Is In Direct And Apparent Conflict With Decisions Of This Honorable Court Regarding Statutory Construction And The Definition Of Words In The Statute In Question.

In direct and apparent conflict with the holdings of this Honorable Court, the District Court and then the First Circuit Court of Appeals ignored the "ordinary, contemporary, [and] common meaning" of the word "dwelling" as contained in the Federal statute.

As this Honorable Court has noted on numerous occasions:

> A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. (Citations omitted.) Therefore, we look to the ordinary meaning of the term "[dwelling]" at the time Congress enacted the statute in 1961.

Perrin v. United States, 444 U.S. 37, 42 (1979); *Accord, Lukhard v. Reed*, 481 U.S. 368, 386 (1987); *Diamond v. Diehr*, 450 U.S. 175, 182 (1980); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975); *Banks v. Chicago Grain Trimmers Assn., Inc.*, 390 U.S. 459, 465 (1968); *Miner v. Mechanics Bank of Alexandria*, 1 Pert 46, 64 (1828); *See* also *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980).

Further:

> When statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning, that is ordinarily "the end of the matter." *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 81 L Ed 2d 694, 104 S. Ct. 2778 (1984). "Going behind the plain language of a statute in search of a possible contrary congressional intent is a step to be taken cautiously even under the best of circumstances."

United States v. Locke, 471 U.S. 84, at 95-96, 86 L Ed 2d 64, 105 S. Ct. 1785 (1985).

Amoco Production Co. v. Gambell, 480 U.S. 531, 553 (1987).

How could the First Circuit Court of Appeals possibly conclude that "dwelling," as used by Congress, meant only those places of abode that possessed indoor plumbing and electricity? The "ordinary, contemporary, common meaning" of "dwelling" required only that it be "a building or other shelter in which people live."

In 1961, when Congress adopted The Cape Cod National Seashore Act, millions of Americans were living in "dwellings" or "housing units" which did not have indoor plumbing.[6] As the Census conducted in 1960 reveals, 4,127,667 of the 58,326,357 "housing units" did not have indoor plumbing; 5,978,261 did not have indoor toilet facilities, and 6,921,639 – that is, 12% of the "housing units" in the United States – did not have a bathtub or shower. In other words, 12% of the "housing units" in the United States would not have qualified as "dwellings" under the holding of the First Circuit Court of Appeals here challenged.[7]

In 1960, in many regions of the country, a very significant portion of the buildings or other shelters in which Americans lived did not have indoor plumbing. For example, in Mississippi 210,666 of the 628,945 housing units

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[6] The Bureau of the Census did not ascertain the number of homes which did not have electricity in 1960. However, according to the Rural Electrification Administration (REA), in 1960 approximately 400,000 out of the 5,200,000 rural households served by the REA were without electricity. That is, 7% of REA households were without electricity in 1960. Annual Statistical Report, Bulletin 1-1, Rural Electrification Administration, vii (1960).

[7] United States Census of Housing 1960, Final Report HC(1)-1, United States Department of Commerce, Bureau of the Census, Table 3.

did not have indoor plumbing; 247,971 did not have indoor toilet facilities, and 273,663 did not have a bathtub or shower. Numerous other states had similar figures.[8]

Even in Massachusetts, 7,571 of the 1,690,998 housing units did not have indoor plumbing; 15,334 did not have indoor toilet facilities; 58,741 did not have a bathtub or shower.[9]

Does the First Circuit truly believe that during the period from 1959 to 1961 when Congress was considering The Cape Cod National Seashore Act, it chose to use a word for the place where someone lives which did not

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[8] *Id.* In Virginia, 177,273 of the 1,168,913 housing units had no indoor plumbing; 252,034 had no indoor toilet facilities and 271,983 had no bathtub or shower. In Minnesota, 113,128 of the 1,119,271 housing units had no indoor plumbing; 154,619 had no indoor toilet facilities and 181,566 had no bathtub or shower. In New York, 66,034 of the 5,695,880 housing units had no indoor plumbing; 101,085 had no indoor toilet facilities and 163,189 had no bathtub or shower. In New Jersey, 15,753 of the 1,998,940 housing units had no indoor plumbing; 28,803 had no indoor toilet facilities and 61,265 had no bathtub or shower. In Illinois, 120,108 of the 3,275,799 housing units had no indoor plumbing; 185,045 had no indoor toilet facilities and 231,406 had no bathtub or shower. In Colorado, 32,209 of the 594,522 housing units had no indoor plumbing; 49,124 had no indoor toilet facilities and 52,834 had no bathtub or shower. In Arizona, 24,562 of the 415,834 housing units had no indoor plumbing; 35,541 had no indoor toilet facilities and 38,337 had no bathtub or shower. In California, 44,065 of the 5,465,870 housing units had no indoor plumbing; 93,220 had no indoor toilet facilities and 98,320 had no bathtub or shower.

[9] *Id.* The fact that 58,741 "housing units" in Massachusetts did not have a bathtub or shower makes it clear that the Minimum Standards of Fitness for Human Habitation promulgated by the Massachusetts Department of Public Health upon which the First Circuit erroneously relied is not the mandatory requirement that the First Circuit concluded that it was.

apply to 6,921,639 of the "housing units" in the country, or 58,741 "housing units" in Massachusetts? Such a conclusion strains credulity.

This Honorable Court should grant *certiorari* in the instant matter to reaffirm that words of a statute are to be given their "ordinary, contemporary, common meaning." To do otherwise is to permit lower courts to read into a statute a meaning that was not, and could never have been, intended by Congress.

B. The Decision Of The First Circuit Court Of Appeals Is In Direct And Apparent Conflict With Decisions Of This Honorable Court Which Recognize That Congress Expresses Its Intent Through The Language It Chooses.

This Honorable Court has made it quite clear that there is a strong presumption that Congress expresses its intent through the very language it chooses. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). *See United States v. James*, 478 U.S. 597, 606 (1986); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In the instant matter, Congress purposefully selected the word "dwelling," which it chose not to define further.[10] Rules of statutory construction require that we take Congress at its word. If Congress had meant to limit the protection from eminent domain which it was enacting into law, it could have limited that protection to, for

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[10] In The Cape Cod National Seashore Act, Congress modified the word "dwelling" by requiring that such dwellings be "detached," that they be "one-family," and that their construction began "before September 1, 1959." Congress could have further modified "dwelling" so as to limit its applicability. It did not do so.

example, "dwellings" with indoor plumbing and electricity.[11] It did not do so.[12]

In the absence of an affirmative decision by Congress to limit the breadth of the protection from the Government's power of eminent domain, no court may sanction the adoption of another definition which is significantly narrower than the one adopted by Congress. This the National Park Service seeks to do.[13]

This Honorable Court should grant *certiorari* in the instant matter to reaffirm that the words of a statute, as selected by Congress, are interpreted as intended by Congress. To do otherwise is to permit lower courts to ignore the words used by Congress and to read into the statute a meaning that was not, and could never have been, intended by Congress.

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[11] For example, Congress required compliance with the zoning by-laws adopted by each of the six towns pursuant to the regulations adopted by the Secretary of the Interior. Congress could have required – but did not require – compliance with state health and housing codes.

[12] Any word that Congress could have selected would have required modifying language to restrict protection from eminent domain to "housing units" with indoor plumbing and electricity. That is the case because each of those words necessitates little more than the proverbial roof over one's head: abode, domicile, lodging, residence, room, apartment, cottage, house, home, habitation, cabin, hut, shelter, quarters, bungalow, chalet, lodge, castle, chateau, estate, manor, villa, hovel.

[13] The National Park Service seeks to mutate the word "dwelling" from its ordinary, contemporary and common meaning into a new word the definition of which includes indoor plumbing and electricity.

C. The Decision of the First Circuit Court of Appeals Is in Direct and Apparent Conflict With Decisions of This Honorable Court Which Sharply Limit The Grant of Eminent Domain Authority.

The District Court and the First Circuit Court of Appeals failed to strictly construe the statutory grant of the power of eminent domain by their erroneous interpretation of the word "dwelling" as contained in the Federal statute.

This Honorable Court has long recognized that "the taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed." *Delaware, L. & W. R. Co. v. Morristown*, 276 U.S. 182, 192 (1928).[14]

Notwithstanding this rule of statutory interpretation, the First Circuit Court of Appeals, rather than strictly

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[14] This proposition could not be more fundamental:

> As a general thing, statutes conferring the power of eminent domain are to be strictly construed against the one exercising the power and in favor of the landowner, since the exercise of the power of eminent domain is in derogation of the right of the citizen. Such statutes are not to be extended or broadened by inference or implication or by judicial construction. A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication; and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained. The person or body claiming the right to exercise such delegated power must be able to point to the statute which either expressly or by necessary implication confers that right. Authority cannot be implied by or inferred from vague or doubtful language; when the matter is doubtful, it must be resolved in favor of the property owner.

26 Am. Jur. 2d, *Eminent Domain*, §18 (1966).

construing the power to condemn, gave that power one of the most expansive definitions possible. Thus the First Circuit Court of Appeals has turned an important rule of statutory construction on its head. While this Honorable Court has been carefully crafting the doctrine of regulatory takings to ensure the sanctity of constitutionally protected property rights,[15] the First Circuit Court of Appeals has greatly diminished those rights.

This Honorable Court should grant *certiorari* in the instant matter to ensure that rules of statutory interpretation meant to protect property rights be preserved. To do otherwise is to permit lower courts to interpret statutes so as to further diminish the protection afforded by the Constitution of our private property rights.

II. THE FIRST CIRCUIT COURT OF APPEALS IGNORED THE CLEAR LEGISLATIVE HISTORY OF THE CAPE COD NATIONAL SEASHORE ACT IN ITS ERRONEOUS INTERPRETATION OF THE WORD "DWELLING" AS CONTAINED IN THAT ACT, AND THEREBY BREACHED THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS.

The First Circuit Court of Appeals, by ignoring the clear legislative history of The Cape Cod National Seashore Act, is not interpreting the law, but is enacting legislation. At the very least, the First Circuit Court of Appeals is sanctioning the effort of the National Park Service to enact legislation rather than to enforce the law. In either case, the First Circuit Court of Appeals has breached the separation of powers doctrine as contained in our Constitution.

The legislative history in the instant matter could not have been more clear. The Congress repeatedly indicated that it wanted to preserve intact the cottages that dot the

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[15] *See*, for example, *Nollan v. California Coastal Commission*, 483 U.S 285 (1987).

Cape Cod seashore and that give that seashore its rich character. There is absolutely no language that indicates otherwise.[16]

The legislative history accompanying The Cape Cod National Seashore Act makes it clear that it was the intent of Congress to protect the private property rights of the owners of the preexisting structures within the 30,000 acres comprising the Cape Cod National Seashore.

> The bill encourages the Department of the Interior to give the respected and responsible property owners of the lower Cape living within the seashore area and their children *the most sympathetic consideration and cooperation;* enabling them to hold and administer their property *as they have in the past* . . . .

S. Rep. No. 428, 87th Cong., 1st Sess. 12, *reprinted in* 1961 *U.S. Code Cong. & Ad. News* 2212, 2221. (Emphasis added.)

On September 3, 1959, the late U.S. Senator John F. Kennedy stated, when introducing the bill on the floor of the Senate:

> Cape Cod is more heavily settled . . . than most previous park areas. . . . We have therefore . . . made several provisions which afford a method by which the threat of residential property condemnation can be eliminated by local action.
>
> * * *
>
> In any of the six towns which adopt zoning meeting standards defined by the Secretary of the Interior, *all homeowners* in those towns whose property lies within the diagram of the Park *are assured of the right to continue to own and occupy their home without interruption or interference so long as the zoning is kept in force.*

105 Cong. Rec. 17888 (1959). (Emphasis added.)

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[16] The absence of any legislative history to support the position taken by the National Park Service may be one reason for the silence of the United States Government in response to Ms. Bessay's petition.

The then Director of the National Park Service, Conrad L. Wirth, testified:

> This bill states that *we have no power of domain over a home.* Therefore that home can remain there as long as it complies with the zoning which the Secretary of the Interior approves, namely, that it be kept as a residence.

Cape Cod National Seashore Park: Hearings on S.857 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs, 87th Cong., 1st Sess. 42 (1961). (Emphasis added.)

Congress clearly sought to preserve the natural ecological balance of portions of lower Cape Cod, while permitting area residents to continue their unique lifestyle. Congress recognized that the simple, residential homes fit into the natural ecological balance:

> Generally, the seashore proposal involves open and forested lands and some portions with scattered homes and cottages. Included are a few isolated groups of cottage rental units of primitive seashore type and several small snack and curio stands. By and large, the homes and cottages are seasonal in use, and until recent years, widely scattered.

S. Rep. No. 428, 87th Cong., 1st Sess. 9-10, *reprinted in* 1961 *U.S. Code Cong. & Ad. News* 2212, 2218.

The Act specifically requires that the area be managed "in such a way as not to diminish the value or enjoyment of any residential property in the seashore. . . ." *Id.*, at 29, *reprinted* at 2236. In fact, Congress specifically referenced certain groups of seasonal dwellings it intended to exempt from condemnation:

> In 1957, there were 1,136 *seasonal homes* and 554 *all-year residences* in the town of Eastham. Within the Eastham portion of the proposed seashore, there were 98 *seasonal homes* and 60 *all-year residences.* In Truro there were 665 *seasonal homes* and 207 *all-year residences,* with 185 *seasonal* and 68 *all-year residences* within the proposed area. *There are 5 to 7 seasonal homes in Orleans,*

> *about 10 in Provincetown and 5 to 7 in Chatham ranging in value from $200 to $2,000.*

Id., at 10, *reprinted* at 2219.[17] (Emphasis added.)

On the floor of the U.S. Senate, U.S. Senator Bible stated on June 27, 1961:

> Great care has been taken in the bill to provide for the continued ownership and use of the rather substantial number of private homes which exist on Cape Cod within the suggested boundaries of this national seashore. *The report delineates in detail, on page 10, the homes which are located within the proposed boundaries of the Cape Cod National Seashore.* So long as the homes in private ownership are maintained in accordance with zoning provisions adopted by the affected towns that conform to standards established by the Secretary of the Interior, the Secretary's authority to condemn such private property will be suspended.

107 Cong. Rec. 11391 (1961).[18] (Emphasis added.)

This Honorable Court should grant *certiorari* in the instant matter to ensure that the legislative history which accompanied the adoption of The Cape Cod National Seashore Act is given full force and effect and that the interpretation that is given to the words of the statute is

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[17] Ms. Bessay's home in Provincetown was one of the ten homes mentioned by Congress. It is unlikely, even in 1957, that a home valued at $200 could have been equipped with such modern conveniences as electricity and indoor plumbing.

Note that in its discussion of the cottages which it sought to protect, Congress spoke of "seasonal homes" and "all year residences." Both words, "homes" and "residences," are synonymous with "dwelling," and clearly necessitate further modifying language to restrict application of the protection from eminent domain to "housing units" with indoor plumbing and electricity.

[18] The list of homes which Congress meant to protect from the power of eminent domain is the one above at footnote 17.

consistent with that extensive legislative history. To do otherwise is to permit lower courts and agencies of the Executive Branch to violate the separation of powers doctrine by engaging in acts which are restricted to the Legislative Branch.

III. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER OF FEDERAL LAW AND GENERAL LAW.

The holding of this Honorable Court that "[w]hen statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning, that is ordinarily 'the end of the matter,' " has been adhered to by every Circuit Court of Appeals. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). For example, *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 900 (2d Cir. 1989); *Garrett v. Lyng*, 877 F.2d 472, 474 (6th Cir. 1989); *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 399 (9th Cir. 1989).

In the instant matter, the failure of the First Circuit Court of Appeals to use the "ordinary, contemporary, common meaning" of the word "dwelling," and its failure to limit its interpretation of The Cape Cod National Seashore Act to the word selected by Congress, puts the instant decision in conflict with the decisions of other circuits which are consistent with those of this Honorable Court.

This Honorable Court should grant *certiorari* in the instant matter to reaffirm that words of a statute are to be given their "ordinary, contemporary, common meaning." To do otherwise is to permit lower courts to read into a statute a meaning that was not, and could never have been, intended by Congress.

IV. THE ISSUES INVOLVED IN THIS PETITION ARE CRITICALLY IMPORTANT TO CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS WHICH WILL BE ADVERSELY AFFECTED NOT JUST IN THE INSTANT CASE BUT THROUGHOUT THE UNITED STATES.

The decisions of the District Court and the First Circuit Court of Appeals, by giving a federal statute an unwarranted and improper construction, adversely affect important constitutional issues including the right of the American people to be safe from takings unauthorized by the U.S. Congress. Obviously the petitioner, Ms. Bessay, will suffer mightily should the decision of the First Circuit Court of Appeals be left standing. However, much more is at stake here than the future of Ms. Bessay – as troubling as that future is without her beloved but admittedly humble cottage.

The language used by Congress to protect Ms. Bessay and others like her, that is, the "improved property" language in The Cape Cod National Seashore Act, is often referred to as the "Cape Cod formula." That formula has been used by Congress to protect the property rights of those within the boundaries of newly created national parks.

Congress has used the "Cape Cod formula" in scores of subsequent statutes. If the decision of the First Circuit Court of Appeals is permitted to stand, then the "Cape Cod formula" which was meant to serve as the shield by which the property rights of inholders are protected, will instead become the sword with which those property rights will be taken away.

Amici represent the hundreds of Americans who own property within the boundaries of areas such as the Cape Cod National Seashore. Not surprisingly, given the areas which are deemed appropriate for designation as components of America's national park system, the "dwellings" within these boundaries are often "rustic," possessing neither indoor plumbing nor electricity. Obviously that does not mean that they are not "dwellings," merely that

– under the decision of the First Circuit – they would not qualify for protection from the exercise of the power of eminent domain by the National Park Service.

The problems presented to this Honorable Court by the instant petition go far "beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). The erroneous decision of the First Circuit Court of Appeals will mean that hundreds of Americans – who were assured by Congress that their "dwellings" would not be subject to the threat of unbridled application of the power of eminent domain by the United States Government – can have their property condemned at the whim of the National Park Service.

This petition presents an important constitutional issue – the protection of our most basic right, the right to own property. The decision by the First Circuit Court of Appeals could not be more erroneous. In light of the number of Americans who will be affected by this dangerous precedent a grant of *certiorari* is compelled.

CONCLUSION

The last motion picture in which the great Bette Davis appeared before her death in 1989 was the critically acclaimed *The Whales of August*. Ms. Davis and her co-star, Lillian Gish, portrayed two sisters who for sixty summers had returned to their humble cottage off the coast of Maine where they awaited the return of the whales of August. One summer, however, they must decide whether to give up their rustic family home along with their independence and life together.

If the National Park Service had scripted this story of survival, hope and triumph, the sisters would never have returned to their cottage to watch the whales of August, to reminisce on the decades spent at the shore, and to decide on their future. Instead the sisters' cottage would have failed to qualify as a "dwelling," they would have been evicted from their summer cottage, and they would

have spent their golden years far from the shore they loved.

Ms. Bessay is now in that very position. The interpretation placed by the National Park Service upon the Act of Congress is an outrageous one, unsupported by fact or law. It is directly contrary to the will of Congress. The decision of the First Circuit Court of Appeals is fundamentally flawed and cannot be permitted to stand. If it does, not only Ms. Bessay will suffer, but so too will hundreds of Americans whose property lies within federal boundaries, who thought their property was entitled to protection from the eminent domain powers of the United States Government.

Accordingly, this Honorable Court should grant the Writ of *Certiorari* and reverse the ruling below.

Indeed, so egregious and without basis is the decision of the First Circuit that this Honorable Court is hereby respectfully urged to reverse the decision of that court based upon the petition and this brief *amici curiae*.

Respectfully submitted,

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